IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO.42 OF 1998
IN
REFERENCE APPLICATION NO.13 OF 1992

The Commissioner of Sales Tax,
Maharashtra State, Mumbai .. Applicants
V/s
Hari and Company .. Respondents

Mr.Niranjan Pandit for the Applicants.
Mr.P.C.Joshi for the Respondents.

CORAM: DR.S.RADHAKRISHNAN &
J.P.DEVADHAR, JJ.

DATE : 03.03.2006.

ORAL JUDGMENT: (Per Dr.S.Radhakrishnan,J.)

1. The present Sales Tax Reference has been made u/s.61 of the Bombay Sales Tax Act, 1959 at the instance of the Commissioner of Sales Tax of the Maharashtra Sales Tax Tribunal, to this Court for the determination of the question of law which arises out of the order passed by the Tribunal dated 11th October, 1991. in an Appeal filed by the Respondents herein.

2. The question arises under Section 9 of the Maharashtra Sales Tax on the Transfer of Property in Goods involved in the Execution of Works Contract (Re-enacted) Act 1989, (hereinafter : Works Contract Act), read with Section 6(1) of the Bombay Sales Tax Act, 1959. The corrected question as argued upon by both the parties reads as follows:

"In the facts and circumstances of the case and on a

true and correct interpretation of Section 2(1)(d) of the Maharashtra Sales Tax on the Transfer of Property in Goods involved in the Execution of Works Contracts (Re-enacted) Act, 1989 (hereinafter: the Works Contract Act) was the tribunal jusfified in law in holding that the Respondents are not to pay tax under the said Works Contract Act on their transaction of taking out the xerox copies on a xerox machine and that they are not a "dealer" as defined under Section 2(1) (d) of the said Act.?"

3. Hari & Co. the present Respondents are involved in the business of comb-binding, electric or electronic typing, computerised art work and taking out duplicate copies by photocopying. On 10th June, 1988 an application was made by the Respondents u/s.52 of the Bombay Sales Tax Act read with Section 9 of the Works Contract Act to the Additional Commissioner of Sales Tax to decide three questions:

i) Whether they fall within the ambit of ‘dealer’ as defined in the Works Contract Act?

ii) Whether the transactions described and evidenced in the cash memo are sales within the meaning of "sale" as defined in the Works Contract Act?

iii) If the transactions are sales, what is the sale price in each transaction?

4. By an order passed under Section 9 on 25th January, 1989 it was held that the contract price would be the subject matter of sales tax. An appeal was preferred before the Tribunal, which partly allowed the Appeal to the extent of (a) Electric/Electronic typing; (b) Computerised Art Works and (c) taking out copies of xerox. As far as comb-binding was concerned, it was held that it amounted to sale under Works Contract Act and the Respondent was held to be a dealer under the said Act. Reference application filed by the present Applicants was allowed for determination of the above-mentioned question.

SUBMISSIONS OF APPLICANTS:

5. Mr.Pandit, the learned Counsel for the Applicants relied on the case of **Builders Association of India & Ors. V/s.Union of India & Ors. - (1989) 13 STC 370,** (hereinafter the Builders case), to contend that there exists four kinds of contracts:

i. Work done by the assessee on the property of the Customer using the assessee’s material (as in construction contracts),

ii. Property is given by the customer to the assessee for carrying out improvement thereon

(retreading of tyres),

iii. No property given by the customer to the assessee for any improvement. Entire raw material of the assessee, out of which goods are produced by the customers.

iv. Customer supplies negatives of films for developing and printing of positive copies by the Assessee.

6. Mr.Pandit contended that in the process of photocopying as in the present case, the assessee utilises his own property, i.e.paper and ink and there is a definite transfer of ‘goods’. The learned counsel for the Applicants also referred to the case of **Associated Cement Companies Ltd. V/s.Commissioner of Customs - 124 STC 59** (hereinafter: the ACC case). The Hon’ble Supreme Court in the above case supports the proposition that in case of a contract where the transfer of goods take place, it is a contract of sale, notwithstanding the small percent value of transfer. Whether the transfer is incidental to the contract or intentional is immaterial. Mr. Pandit contended that in the light of the scenario post Forty-Sixth Constitution (Amendment) Act, 1989 wherein clause 29A was inserted in Article 366, even composite contracts can be bifurcated to levy sales tax on the value of

material involved in the execution of works contract. This view, adopted in **Hindustan Shipyard Ltd. V/s.State of Andhra Pradesh - (2000) 6 SCC 579** has been confirmed in the ACC case.

7. Mr.Pandit, the learned Counsel for the Applicants further contended that the concept of dominant intention of contract has been bypassed by the ACC case. The judgment in the ACC case has held that - **"even if dominant intention of contract is rendering of a service, which will amount to a works contract, after the Forty-Sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract".** The said Forty Sixth Amendment to the Constitution was held to be constitutional and applicable to goods transferred in a composite contract, in the aforesaid Builders case.

8. The learned Counsel Mr.Pandit then relied on the definition of 'Sale' as defined in Section 2(1) (l) of the Works Contract Act and contended it to be applicable to a contract of photycopying. As per the aforesaid provision, **'Sale' means a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract in the State, and the word 'sell' with all its grammatical variation and cognate expressions shall be construed accordingly."**

9. It was thus argued by the learned Counsel that the

main focus is the transfer of property in an impugned contract, whether as ‘goods’ or in some other form. If the criteria of transfer are fulfilled, then there would be a deemed sale of materials, whether the exchange of materials was an express clause of contract is immaterial. This has been the clear view of the Division Bench of our Court in the case of **Commissioner of Sales Tax V/s.Matoshree Textile Ltd.- (2003) 132 STC (Bom) 539.** (hereinafter the Matoshree case).

10. Mr.Pandit, the learned counsel also pointed out that the correctness of judgment of **Rainbow Colour Lab.V/s.State of Madhya Pradesh & Ors. - 118 STC 9,** was doubted by a larger Bench of the Hon’ble Supreme Court in ACC case. The ratio in Rainbow colour Lab Case as was contended by the Counsel for the Applicants runs counter to the provision contained in Article 366(29A) of the Constitution of India as also in the judgment of the Constitutional Bench of the Supreme Court in the Builders case. Mr.Pandit also referred to Paragraph No.26 of the judgment of the ACC case in that behalf, which reads as under:- which reads as under;-

> "In arriving at the aforesaid conclusion the Court referred to the decisions of the Court in Hindustan Aeronautics Ltd.V/s.State of Karnataka - (1984) 55 STC 314; (1984) 1 SCC 706 and Everest Copiers (1996) 103 STC 360. But both these cases related to pre Forty-sixth Amendment era where in a works

contract the State had no jurisdiction to bifurcate the contract and impose sales tax on the transfer of property in goods involved in the execution of a works contract. The Forty-sixth Amendment was made precisely with a view to empower the State to bifurcate the contract and to levy sales tax on the value of the material involved in the execution of the works contract, notwithstanding that the value may represent a small percentage of the amount paid for the execution of the works contract. Even if the dominant intention of the contract is the rendering of a service, which will amount to a works contract, after the Forty-sixth Amendment the State would now be empowered to levy sales tax on the material used in such contract. **The conclusion arrived at in Rainbow Colour Lab case (2000) 118 STC 9 (SC); (2000) 2 SCC 385, in our opinion runs counter to the express provision contained in Article 366(29A) as also of the Constitution Bench decision of this Court in Builders Association of India V/s.Union of India (1989) 73 STC 370; (1989) 2 SCC 645." (Emphasis supplied)**.

11. Relying on the aforesaid judgments, Mr.Pandit, the learned Counsel for the Appellants submitted that the process of photocopying indeed involves transfer of tangible good in the form of paper and ink, owned by the assessee, passed into the hands of a customer post duplication of documents. By creating legal fiction,

the 'transfer of property' part of contract can be easily carved out to include it within the ambit of definition of 'sale' in the Works Contract Act and attract sales tax in light of the post Forty-sixth Constitution Amendment situation.

SUBMISSIONS OF RESPONDENTS:-

12. Mr.P.C.Joshi, the learned Counsel on behalf of the Respondent Company submitted that the Respondent accomplished the job of photocopying with the help of technical personnel having knowledge and skill of operating various machines installed by the Respondent for the purpose of taking out photocopies. Mr.Joshi also pointed out that the Applicants have not challenged the decision of the Tribunal in regard to electric/electronic typing and computerised art as service contracts, as such have attained finality. According to Mr.Joshi, the job of photocopying did not involve any transfer of property in the execution of works contract. It was contended that the transfer of property in paper is a post-execution event, which does not take place during the course of the execution of the job and therefore such a transfer can be said to be an 'incidental event' consequent to the dominant job of rendering service through the skilled operator. In support of this contention, Mr.Joshi relied upon the judgment in the case of **Assistant Sales Tax Officer**

V/s.B.C.Kame - (1997) 39 STC 237, wherein it was held that -

> "A contract of sale is one whose main object is the transfer of property in and the delivery of the possession of a chattel as a chattel to the buyer. Where the principle object of work undertaken by the payee of price is not the transfer of chattel quo chattel, the contract is one of work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become subject of sale; neither ownership of materials nor value of skill and labour as compared with the value of materials is conclusive although such matters may be taken into consideration in determining the circumstances of a particular case whether the contract in substance one for work and labour or one for sale of a chattel."

13. Mr.Joshi, strongly relied on the judgment in the case of **Government of Andhra Pradesh V/s.Guntur Tobaccos Ltd. - (1965) 16 STC 240**, which referred to all types of contracts, and referred to the following exerpt from the said judgment:-

> "The fact that in the execution of a contract for work some materials are used and property in the goods so used passes to the other party, the contractor undertaking to do the work will not

necessarily be deemed on that amount to sell the materials. A contract for work in the execution of which goods are used may take one of the three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price, it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work; or it may be a contract for work and use or supply of materials though not necessarily to the execution of the contract is voluntary or gratuitous..... Whether a contract is of the first or the second class must depend upon the circumstances; if it is of the first, it is a composite for work and sale of goods; where it is of the second category it is a contract of work not involving sale of goods."

14. Mr.Joshi then contended that consequent to the Forty-sixth Constitutional Amendment only that part of the indivisible work contracts were brought under the net, which involve the transfer of property in goods that are involved in the execution of works contract. In other words, each and every transfer of proper;ty, incidental to the job in all typ[es of contracts were not brought in the tax net. The service contracts of photography, photocopying, cyclostyling, typing and microfilming continued to be outside the purview of the expanded meaning of the term ‘tax on sale or purchase of

goods' under the Constitution of India, relying on the Builders case, which quotes the following paragraph of **M/s.Gannon Dunkerly V/s.State of Madhya Pradesh (1958) 90 STC 353**. This principle has been stated by Hon'ble Blackburn J. in **Appleby V/s.Myres**, reproduced as under:-

> "Materials worked by one into the property of the other become part of that property. This is equally true whether it be fixed or movable property. Bricks built into a wall become a part of the house; thread stitched into a coat which is under repair, or planks and nail become part of the coat or ship." (Emphasis supplied)

15. Mr.Joshi, thus contended that the Builders case has explicitly stated as to when a case would involve transfer of property in the execution of works contract. Hence following this specification the learned Counsel for the Respondent company stated that taxable event covered only those cases wherein the property in the goods involved in the execution of works contract passes on the principle of accretion and accession.

16. Mr.Joshi, the learned Counsel thereafter contended that the service of photocopying involves specialised knowledge about the correct method and manner of operating the machines in question placing of paper at appropriate place and giving proper and correct lighting

effect. According to Mr.Joshi, the use of the words transfer of property in execution of works contract makes it clear that the transfer of property occurs during the continuance of the work contract and not after it. Thus the transfer of goods must be involved in the works contract. Relying on the definition of 'involve' as 'to have' within or as part of itself (Webster's Third New International Dictionary) the Respondents Counsel contended that since the property (paper) was transferred at the end of contract it did not fall within the purview of the above definition. The photocopy attendants could even destroy the paper if payment was not made.

17. Mr.Joshi further contended that as held in the Builders case, the taxable event contemplated under Article 366(29A) (b) of the Constitution of India covers only those cases wherein the property in the goods involved in the execution of the works contract passed on the principle of accretion and accession. According to the learned Counsel there can be transfer of property in execution of works contract only when material belongs to the principal, on which work is done by the contractor involving use or supply of his own goods. However in the case of photocopying since material belongs to the assessee and is disposable, if contract is not completed to satisfaction, the said material cannot be said to follow the principle of accretion or accession.

18. It was further contended by Mr.Joshi that as inference can be drawn from the concluding phrase used in Article 366(29A) of the Constitution of India, there has to be an identity of the goods even after the passing of the property during the execution of works contract, may be as a part of moveable property or of an immoveable one. The meaning of 'goods' has to be understood as defined by Article 366(12) of the Constitution of India. Therefore a predominant ingredient required to be satisfied is the transfer of property in goods for an agreed monetary consideration. The service contracts undertaken by the Respondents do not involve any transfer of property in goods during execution of photocopying. When the ink is used in photocopying it can be said to have been consumed in the job along with the incidental transfer of paper, on which duplicate copies are taken out.

19. Mr.Joshi, therefore contended that the service contracts undertaken by the Respondents do not involve any transfer of paper, on which duplicate copies are taken out. Service copies requiring skill or acumen for accomplishing job as per satisfaction of customer like photocopying, photography, production of films, sculpting, preparing deeds by advocates/solicitors would not be covered under the said Constitutional Amendment, nor are they known in the market as works contracts.

20. Mr.Joshi then contended that as clarified in the case of **Maharashtra Mudran Parishad V/s.The State of Maharashtra - 139 STC 193**, the dominant object of the parties is one of the governing factors for deciding the nature of transaction involved. Hence the learned Counsel submitted that the judgment of **Associated Cement Company Ltd.**, has absolutely no application to the present case as in that case the controvery arose out of the provisions of the Customs Act 1962 and it did not relate to any interpretation of Article 366(29A) (b) of the Constitution of India.

21. Mr.Joshi further stated that the **Rainbow Colour Lab and Anr. V/s.State of Madhya Pradesh & Others case** had clearly held as under:-

> "Unless there is sale and purchase of goods either in fact or deemed and which sale is primarily intended and not incidental to contract, the State cannot impose Sales Tax on a works Contract in the guise of expanded definition found in Article 366 (29A) r/w 2(n) of the State Act".

. Mr.Joshi pointed out that the Rainbow Colour Labs case construed making photographic prints as a service contract. Mr.Joshi, the learned Counsel for the Respondents also relied on another judgment of the Supreme Court in **C.I.Jidhesh V/s.Union of India & Ors.**

dated 27th October, 2005, wherein also processing of photographs was involved and following the Rainbow Colour Labs case, the Supreme Court decided the same.

CONSIDERATION:-

22. We are clearly of the view that the object of the Constitutional Amendment introduced in the year 1982 was in order to create a 'legal fiction' of 'transfer of goods within the works contract' that is in order to levy a tax on the goods involved in the execution of a works contract. Hence, irrespective of whether the transfer of property is incidental or accessory to a works contract, once a works contract involves transfer of property per se, the provisions of Article 366(29A) of the Constitution of India are attracted.

23. In order to understand the object of the legislature in greater detail let us examine the background in which this amendment was introduced which has been traced in several judicial decisions inter alia the **Builders Associated of India and Others V/s.Union of India and Others- (1989) 73 STC 370,** the relevant portion of which **is** reproduced as under from Page 396/397:-

> "It is true that in the **State of Madras V/s.Gannon Dunkerley and company, (Madras) Ltd. -(1958) 9 STC 353; (1959 SCR 379** this Court held that a works

contract was an indivisible contract and the turnover of the goods used in the execution of works contract could not, therefore, become exigible to sales tax. It was in order to overcome the effect of the said decision Parliament amended Article 366 by introducing subclause (b) of Clause (29-A). Sub-clause (b) of Clause (29-A) states that "tax on the sale or purchase of goods", includes among other things a tax on the transfer of property in the goods. (whether as goods or in some other form) involved in the execution of a works contract. It does not say that a tax on the sale or purchase of goods included a tax on the amount paid for the execution of a works contract. It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29-A) of Article 366 of the Constitution makes the position very clear. While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29-A), the latter part of Clause (29-A) says that "such transfer, delivery or supply of any goods" shall be deemed to be a **sale of those goods** by the person making the transfer, delivery or supply and a **purchase of those goods** by the person to whom such transfer, delivery or supply is made. Hence, a

transfer of property in goods under sub-clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The object of the new definition introduced in clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of "tax on sale or purchase of goods" wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clause A to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. So construed the expression "tax on sale or purchase of goods" in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of Clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under entry 54 of the State List is made subject to under the Constitution."

24. This makes it clear what the amendment in effect does is that it allows the bifurcation of a composite contract in order to tax an incidence of sale by way of transfer of property within its execution. In this

respect coming to the decision of the Hon'ble Supreme Court in the case of ACC, Mr.Joshi has time and again vociferously contended that the said judgment dealt with the Customs Act 1962 and would hence not apply to the present case.

25. We do not agree with this contention. In our opinion the rationale behind the 46th Amendment of the Constitution of India was effectively exemplified in the ACC case and it would be binding inasmuch as the said observation to quote the same:

> "The 46th Amendment was made precisely with a view to empower the state to bifurcate the contract and levy sales tax on the value of the material involved in the execution of works contract, not withstanding that the value may represent a small percentage of the amount paid for the execution of the works contract".

. Applying the said rationale, the contention about the use of paper and ink being incidental or accessory to the execution of the works contract cannot be sustained. The value of the goods transferred is of no relevance. Once there is a transfer of property, it shall be deemed as a sales transaction within the execution of a works contract. The said stance has been taken in the case of **Commissioner of Sales Tax V/s.Matoshree Textiles Ltd. - 132 STC (Bom) 539 -**

"To constitute sale under the (Maharashtra Sales Tax on the Transfer of Property in Goods Involved in the Execution of Works Contract) Act, whether materials used in execution of a works contract passed to the contractor either in its form or some other form. If it passes then there is deemed sale of materials used in the execution of works contract. Even if there is no specific agreement between parties for sale of material, even if the price for such sale is not agreed with, parties and even though the materials are not delivered as materials". (Paragraph 36, Page 560 of the Judgment).

. It further goes on the elaborate in Paragraph No.38, page 561 that -

"Once it is held that the property in goods used in the execution of works contract passes incidentally or by theory of accretion such passing though not a sale under the Bombay Sales Tax would be deemed sale under the Works Contract Act".

26. We are of the view that Rainbow Colour Lab case and C.I.Jideesh Case are no longer good law in view of the express 46th Amendment to the Constitution of India and ACC case. In any event they deal with processing of photographs, hence will have no application in the present case.

27. Mr.Joshi's reliance on **Assistant Sales Tax Officer V/s.B.C.Kame, Government of Andhra Pradesh V/s.Guntur Tobaccos Ltd., and M/s.Gannon Dunkerly V/s.State of Madhya Pradesh,** will be of no assistance, as they were all prior to the 46th Amendment of the Constitition of India.

28. It can hence be logically concluded that even if the dominant intention of contract is the provision of service, once there is a transfer of property within it, that property would be liable to payment of sales tax. This is what was exactly said by the three-Judge Bench of the Supreme Court in the ACC case - (2001) 124 STC 559, which held as quoted in the Matoshree judgment (supra) that -

> "Even if the dominant intention of the contract is rendering of service, it will amount to works contract and after the 46th Amendment, the States would be empowered to levy sales tax on transfer of materials (in any form) used in the execution of the works contract".

. Similarly in the present case the moment paper and ink changed hand it will be construed as 'sale' within the works contract.

29. For all the aforesaid reasons, we hold that in the case of Photocopying, as far as Paper and Ink are

concerned, which are passed on, which passing of property is a deemed sale and tax is leviable on such Paper and Ink under the Works Contract Act.

30. Accordingly, we answer the question referred to us in the negative, i.e. in favour of the Revenue and against the Respondents.

31. The reference is disposed of in the above terms, however with no order as to costs.

(DR.S.RADHAKRISHNAN,J.)

(J.P.DEVADHAR,J.)